79-409

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-409

ROBERT J. CAHILL, *Appellant*

v.

STATE OF KANSAS, *Appellee*

On Appeal from the Supreme Court of the State of Kansas

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1979

No.

ROBERT J. CAHILL, *Appellant*

v.

STATE OF KANSAS, *Appellee*

On Appeal from the Supreme Court of the State of Kansas

JURISDICTIONAL STATEMENT

Appellant, Robert J. Cahill, appeals from the judgment of the Supreme Court of Kansas entered on May 5, 1979 affirming the judgment of the District Court of Shawnee County, Kansas, finding him in contempt of court for his refusal to answer questions regarding his political activities in an investigation conducted by the Governmental Ethics Commission pursuant to Kansas Statutes Annotated (K.S.A.) (1978 Supp.) 25-4118 and 25-4124.

A motion for a rehearing in this matter was denied by an order of the Supreme Court of Kansas entered on June 14, 1979.

OPINIONS BELOW

The opinion filed by the Supreme Court of Kansas is reported at 221 Kan. 772, —— P.2d —— (1979). It is reprinted in Appendix A, 1a-12a, *infra*. The order denying Appellant's motion for rehearing is not reported. It is reprinted in Appendix C, p. 15a, *infra*.

JURISDICTION

Appellant, Robert J. Cahill, was found in civil contempt of court by the District Court of Shawnee County, Kansas, for refusing to answer questions in a deposition in the matter of *Tomasic* v. *Stoll*, Complaint No. 061, before the Governmental Ethics Commission (the Commission). The Commission is a legislatively-created body authorized to oversee and enforce the administration of the Campaign Finance Act of Kansas, K.S.A. (1978 Supp.) 25-4101, *et seq.* (the Act).

Pursuant to K.S.A. 25-4118 and 25-4124, the Commission conducted an investigation into alleged violations of the Act by Margaret G. Stoll. Appellant was not a subject of this complaint, or a party to this proceeding; yet, Appellant was questioned by the Commission about his own acquaintanceships and political activities. He refused to answer these questions, citing, *inter alia*, his rights under the First and Fourteenth Amendments.

The judgment of contempt was affirmed by judgment of the Supreme Court of Kansas, the State's highest

court, entered on May 5, 1979. A motion for a rehearing was denied by the Supreme Court of Kansas by order entered on June 14, 1979.

The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2).

STATUTES INVOLVED

K.S.A. 25-4118. Duties of secretary of state; commission investigations. (a) The secretary of state shall: (1) Furnish forms prescribed and provided by the commission for making reports and statements required to be filed by this act;

(2) furnish information specified and provided by the commission; and

(3) make such reports and statements available for public inspection and copying during regular office hours.

(b) The commission may investigate, or cause to be investigated any matter required to be reported upon by any person under the provisions of this act, or any matter to which this act applies irrespective of whether a complaint has been filed in relation thereto.

K.S.A. 25-4124. Same; rights of respondents; hearing procedure; compulsory process; hearings to be public. (a) After a verified complaint alleging violation of a provision of this act has been filed with the commission, the respondent shall be entitled to examine and make copies of all evidence in the possession of the commission relating to the complaint, including the transcript of the hearing, if any. If a hearing is to be held pursuant to section 22[25-4122], the commis-

sion, before the hearing has commenced, shall issue subpoenas and subpoenas duces tecum at the request of any party. Any hearing held under section 22[25-4122], may be conducted and held by a subcommittee of not less than three (3) members of the commission, of whom not more than a majority shall be of the same political party. Final determination of all complaints shall be made by the commission as a whole. The chairman of the commission or other member presiding over the commission or the presiding member of any subcommittee of the commission shall have the power to: (1) Administer oaths and affirmations; and (2) compel, by subpoena, the attendance of witnesses and the production of pertinent books, papers and documents. Witnesses shall be entitled to receive fees and mileage as provided by law for witnesses in civil actions, which shall be paid out of appropriations to the commission. Depositions may be taken and used in the same manner as in civil actions. Any person subpoenaed to appear and give testimony to or produce books, papers or documents, who fails or refuses to appear or to produce such books, papers or documents, or any person, having been sworn to testify, who refuses to answer any proper question, may be cited for contempt of the district court of Shawnee County, Kansas. The commission shall report to such court the facts relating to any such contempt. Thereupon proceedings before such court shall be had as in cases of other civil contempt.

(b) At every hearing held by the commission: (1) Oral evidence shall be taken only on oath or affirmation.

(2) Each party shall have the right to be represented by legal counsel, to call and examine witnesses, to introduce evidence and to cross-examine opposing witnesses.

(c) All hearings shall be open to the public.

QUESTIONS PRESENTED

I. Whether K.S.A. 25-4118 and 25-4124 are unconstitutional as applied by the State of Kansas and as construed by the Supreme Court of Kansas.

II. Whether Appellant was denied his right of association under the First and Fourteenth Amendments in an inquiry by the State into his political associations and beliefs.

STATEMENT

On November 18, 1976, a complaint was filed against Margaret G. Stoll (Stoll) before the Governmental Ethics Commission (the Commission) of Kansas, alleging that she had failed to file a report of independent contributions and expenditures allegedly made in the District Attorney's campaign in Wyandotte County, Kansas, in August, 1976.

Stoll, 65, is a resident of Wyandotte County, Kansas; she is the mother-in-law of Appellant and resides with him. She signed two printed letters, advocating the defeat of the incumbent District Attorney, Nick Tomasic, which were mailed to registered voters in the aforementioned campaign.

The complaint in *Tomasic* v. *Stoll, supra,* alleged a violation of K.S.A. (1978 Supp.) 25-4110 which requires that:

> "Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contributions to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of one hundred dollars ($100) or more within a calendar year shall make statements containing the information required by K.S.A. 1975 Supp. 25-4108, and file them in the office of the secretary of state so that each such statement is in such office on the day specified in K.S.A. 1976 Supp. 25-4108."

The complaint to the Commission alleged that Stoll had not filed a statement required by K.S.A. (1978 Supp.) 25-4110. On December 15, 1976, the Commission, in an *ex parte* hearing, made a determination of probable cause, pursuant to K.S.A. 25-4122. The Commission is granted explicit powers of investigation by virtue of K.S.A. 25-4118, K.S.A. 25-4122, and K.S.A. 25-4124.

K.S.A. 25-4118 confers a broad grant of investigative authority, stating in part:

> "(b) The commission may investigate, or cause to be investigated any matter required to be reported upon by any person under the provisions of this act, or any matter to which this act applies irrespective of whether a complaint has been filed thereto."

K.S.A. 25-4122 grants to the Commission the authority to investigate complaints filed with it in order

to determine whether or not there exists probable cause of a violation of the Campaign Finance Act.

Appellant, was deposed by the Commission pursuant to K.S.A. 25-4124, which sets forth investigative procedures which may be followed after a finding of probable cause. In pertinent part, this statute authorizes the Commission to:

> "(1) Administer oaths and affirmations; and (2) compel, by subpoena, the attendance of witnesses and the production of pertinent books, papers and documents. . . . Depositions may be taken and used in the same manner as in civil actions. Any person subpoenaed to appear and give testimony or to produce books, papers or documents, who fails or refuses to appear or to produce such books, papers or documents, or any person, having been sworn to testify, who refuses to answer any proper question, may be cited for contempt of the district court of Shawnee county, Kansas. The commission shall report to such court the facts relating to any such contempt. Thereupon proceedings before such court shall be had as in cases of other civil contempt."

On January 6, 1978, Appellant was served with a subpoena requiring his appearance at a discovery deposition in the matter of *Tomasic* v. *Stoll, supra.*

Appellant appeared at the deposition on January 31, 1978, and refused to answer any questions, invoking his rights under the Fifth Amendment and Section 10 of the Kansas Bill of Rights. He then was handed a written grant of immunity dated October 21, 1977, and signed by the Attorney General of Kansas. The deposition was continued to allow Appellant to retain counsel.

At his deposition, Appellant was asked, "How much did it cost you for this particular document?"—referring to a campaign-related letter signed by Stoll, which was received from the printer and paid for by Appellant. Appellant also was asked, "Are you acquainted with J. R. Russell?"—referring to a candidate in the District Attorney's campaign.

Appellant refused to answer these questions. He objected on grounds of state law concerning the situs of the deposition and the relevancy of the questions, and he asserted his constitutional rights to free speech and association.

Appellant's objections were overruled at a hearing on May 18, 1978, and again on May 30, 1978. He was held in contempt of court for refusing to answer the aforementioned questions.

Bond was set, and Appellant remains at liberty, although a hearing has been set for September 24, 1979, to consider Appellee's Motion for Reconsideration of Bond and Execution of Judgment of Contempt.

Appellant appealed the judgment of contempt to the Supreme Court of Kansas, and the judgment was affirmed on May 5, 1979.

The Supreme Court of Kansas rejected Appellant's argument that his First and Fourteenth Amendment rights of association were violated by compelling him to answer questions relating to his political activities. The Court stated:

> "It would appear to be appellant's position that the First Amendment, as construed in the cases outlined above, prohibits the state from compelling testimony from him which relates to his political activities. He asserts in this case that the commission cannot require him to disclose the amount of his expenditure in reproducing the letter which Margaret Stoll signed calling for Nick Tomasic's defeat. The Supreme Court, however, has never held that the First Amendment precludes the states from compelling relevant testimony from a witness merely because that testimony will relate in some degree to that witness' political activities. Appellant has made no showing whatsoever that disclosure of this information interferes with his First Amendment freedoms."

See Appendix A, p. 10a-11a.

The Court also rejected Appellant's arguments concerning the sufficiency of the grant of immunity, the relevancy of the questions propounded, and the situs of the deposition.

Appellant's motion for a rehearing was denied by the Supreme Court of Kansas on June 14, 1979.

THE QUESTIONS ARE SUBSTANTIAL

I. The Constitutionality of the Statutes as Applied by the State of Kansas and as Construed by the Supreme Court of Kansas.

(1) As applied.

Appellant never was charged with a violation of the Campaign Finance Act of Kansas (K.S.A. 25-4101, *et seq.*) (the Act). Instead, pursuant to K.S.A. 25-4118 and 25-4124, Appellant was subpoenaed to appear in an investigation conducted by the Governmental Ethics Commission (the Commission) into alleged campaign violations committed by another person.

On their face, K.S.A. 25-4118 and 25-4124 appear constitutional. The Commission's investigation appeared to serve a legitimate end. However, the scope of the investigation, pursuant to the statutes as applied, allowed the Commission to pursue an apparently legitimate end by means which abused Appellant's constitutional rights. The Commission's use of subpoena power and investigative powers was overly broad, unreasonable, and fundamentally unfair. *Pollard* v. *Roberts,* 283 F.Supp. 248, 256 (E.D. Ark. 1968), *aff'd per curiam,* 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d (1968).

The decision in *Pollard,* affirmed by this Court, held that a statute granting investigative powers to Arkansas prosecutors in cases of alleged election law violations was unconstitutional as applied. The latitude of investigative powers granted the State of Kansas in matters of election law violations should not extend so far as to permit impingement on associational rights of individuals on the mere suspicion that the information sought may constitute or lead to evidence that some of the people concerned, or others, have violated state election laws. *Pollard, supra* at 257-258.

In its zeal to produce an act which safeguards the electoral process, the State of Kansas has fallen short of protecting individuals' constitutional rights from an overly broad, unreasonable and fundamentally unfair subpoena and investigative framework.

(2) As construed.

The Supreme Court of Kansas did not construe these statutes "so as to avoid all constitutional difficulties." *Gooding* v. *Wilson,* 405 U.S. 518, 528, 92 S.Ct. 1103, 1109, 31 L.Ed.2d 408 (1972). Appellant argued to that

Court that his constitutional rights were in jeopardy because of the exercise of unrestricted investigative powers by the Commission. Yet, that Court tacitly approved the application of the statutes as constitutionally sound and found Appellant's arguments concerning deprivation of his rights under the First and Fourteenth Amendments to be without merit.

The Supreme Court of the United States has held that the First Amendment precludes states from compelling relevant testimony from a witness where that testimony relates in some degree to that witness's political activities. *Pollard, supra.* The Kansas court's construction of these statutes, contrary to *Pollard,* not only violated Appellant's constitutional rights but can only invite arbitrary and discriminatory enforcement as well as inhibit the exercise of First Amendment freedoms. *Grayned* v. *City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972). Accordingly, there remain substantial federal questions with respect to the constitutionality of K.S.A. 25-4118 and 25-4124 as construed by the Supreme Court of Kansas.

II. Right of Association.

The investigation by the State of Kansas into Appellant's political activities violated his rights under the First and Fourteenth Amendments by compelling his answers to questions which directly inquired into his political affiliations and associations. Compelled disclosure of affiliation with persons engaged in advocacy (i.e., political candidates), can constitute an effective restraint on freedom of association. *Gibson* v. *Florida*

Legislative Investigation Commission, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963).

The Commission's question whether or not Appellant was acquainted with a political candidate, J.R. Russell, violated the very essence of his freedom of association. This question was an unwarranted attempt to inquire into Appellant's political affiliations and associations clearly not germane to an investigation of alleged campaign violations committed by another. An answer to this overly broad question undoubtedly would lead to additional inquiries into other associations and activities of Appellant and the reasons for such affiliations and conduct. Similarly, the question concerning the cost of documents retrieved by Appellant from a printer was directed at his political activities. The Commission, by compelling Appellant to answer, violated his constitutional rights, since there were other means available to obtain the same information. For example, the invoices of the printer could have been subpoenaed or Stoll, the target of the Commission's investigation, could have been subpoenaed to testify.

The State of Kansas had the duty to confine itself to the least intrusive procedures which were adequate for the purpose, since these questions were within the area of Appellant's First Amendment freedoms. *Lamont* v. *Postmaster General,* 381 U.S. 301, 310, 85 S.Ct. 1493, 1498, 14 L.Ed.2d 398 (1975) (Brennan, J. concurring).

This Court has held that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be

more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

Chief Justice Burger recognized this conflict between First Amendment rights and well-intentioned state election laws, stating:

> "We all seem to agree that whatever the legitimate public interest in this area, proper analysis requires us to scrutinize the precise means employed to implement that interest." *Buckley* v. *Valeo,* 424 U.S. 1, 238, 86 S.Ct. 612, 735, 46 L.Ed.2d 659 (1976) (separate opinion).

The precise means employed by the State of Kansas to implement the legitimate public interest herein violated Appellant's rights of political belief and association, the rights which constitute the very core of the activities protected by the First Amendment. *Elrod* v. *Burns,* 427 U.S. 347, 356, 96 S.Ct. 2673, 2681, 49 L.Ed. 2d 547 (1976).

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Kansas should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Supreme Court of Kansas

The opinion of the court was delivered by

FROMME, J.: Robert J. Cahill appeals from an order finding him in direct contempt for refusing to answer certain questions during the taking of a discovery deposition. The contempt occurred before a judge of the district court in Shawnee County, Kansas. Cahill refused to answer questions posed by counsel after having been directed by the judge to answer. He was found to be in direct contempt and ordered committed to the Shawnee County jail until such time as he purged himself by answering the questions. Bond was set and posted. This appeal followed.

Certain background information is necessary to understand the points raised on appeal. A complaint was filed with the Governmental Ethics Commission against Margaret G. Stoll. This commission was created by K.S.A. 1978 Supp. 25-4119a with the duty and the authority to enforce compliance with the provisions of the Campaign Finance Act.

K.S.A. 1978 Supp. 25-4110 requires every person who makes a contribution or expenditure other than directly to a candidate or a candidate committee, party committee, or political committee, in an aggregate amount of $100.00 or more within a calendar year to file a report of such expenditure with the secretary of state. A complaint was made to the commission that Margaret G. Stoll made various undisclosed property contributions exceeding in value the amount limited by statute in an effort to promote the candidacy of

J. R. Russell in his bid to unseat Nick Tomasic as district attorney. This was alleged to have occurred in the 1976 campaign. One such item claimed was evidenced by a C.O.D. delivery ticket for printing 25,000 envelopes over Mrs. Stoll's signature, costing $173.16 and receipted for by Robert J. Cahill. Mrs. Stoll is the mother-in-law of Mr. Cahill.

The commission, after making the probable cause determination against Mrs. Stoll as required in K.S.A. 1978 Supp. 25-4122, served Mr. Cahill with a subpoena to appear for the purpose of giving his deposition.

K.S.A. 1978 Supp. 25-4124 in pertinent part provides:

> "Depositions may be taken and used in the same manner as in civil actions. Any person subpoenaed to appear and give testimony or to produce books, papers or documents, who fails or refuses to appear or to produce such books, papers or documents, or any person, having been sworn to testify, who refuses to answer any proper question, may be cited for contempt of the district court of Shawnee county, Kansas. The commission shall report to such court the facts relating to any such contempt. Thereupon proceedings before such court shall be had as in cases of other civil contempt."

Appellant Cahill appeared at the deposition hearing but invoked his right to remain silent on the grounds his testimony might incriminate him. This right was claimed under the Fifth Amendment. Thereupon Mr. Cahill was handed a grant of immunity in writing,

signed by the attorney general. The grant is verified before a notary public and reads:

"Notice and grant of immunity from prosecution

> "I, Curt T. Schneider, duly elected, qualified and acting Attorney General of the State of Kansas, on this *21st* day of October, 1977, do hereby authorize and do grant immunity from prosecution or punishment to Robert J. Cahill on account of any transaction or matter contained in any statement or about which such person shall be compelled to testify relating to or in connection with the campaign for the Democratic nomination for the office of District Attorney for the 29th Judicial District, held in 1976, and such statement on testimony shall not be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance."

Because of certain objections to questions and refusal of Mr. Cahill to answer, the deposition was being taken in the presence of a district judge in Shawnee County. Mr. Cahill was handed one of the letters signed by Mrs. Stoll and was asked: "How much did it cost you for this particular document," and "Are you acquainted with J. R. Russell." Mr. Cahill refused to answer either question on the advice of counsel. The C.O.D. delivery ticket for printing 22,500 envelopes was produced and handed to Mr. Cahill. He was asked about payment of the printing cost. Counsel for Cahill again objected to Mr. Cahill answering further questions concerning the three documents identified as Exhibits 1, 2, and 3. These included two letters printed

over the signature of Mrs. Stoll plus the C.O.D. delivery ticket. Counsel for the commission requested permission to inquire further concerning possible agreements between Cahill and Russell, concerning the use to which the letters were to be put, concerning where the money was to come from to finance the production and distribution of the letters, and concerning where the mailing information came from. Further response was refused by Mr. Cahill.

An order holding Mr. Cahill in direct contempt of court was entered and this appeal followed.

Appellant first contends that the written grant of immunity tendered him was not coextensive with the scope of the constitutional privilege against self-incrimination and he therefore cannot be compelled to testify.

The Fifth Amendment privilege against compulsory self-incrimination reads as follows:

> "No person . . . shall be compelled in any Criminal Case to be a witness against himself. . . ."

Section 10 of the Kansas Bill of Rights provides in part:

> "No person shall be a witness against himself. . . ."

The privilege also finds expression in the Kansas statutes in K.S.A. 60-425, which provides:

> "Subject to K.S.A. 60-423 and 60-437, every natural person has a privilege, which he or she may claim, to refuse to disclose in an action or to a public official of this state or the United States or any other state or any governmental agency or

> division thereof any matter that will incriminate such person."

The Fifth Amendment is, of course, applicable to the states through the Fourteenth Amendment. See *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964); *State v. Montanez,* 215 Kan. 67, 69, 523 P.2d 410 (1974). This court has, however, consistently held that the same protections are provided by Section 10 of the Kansas Bill of Rights as by the Fifth Amendment to the United States Constitution. See *In re Birdsong,* 216 Kan. 297, 299, 532 P.2d 1301 (1975); *State, ex rel., v. Koscot Interplanetary, Inc.,* 212 Kan. 668, 676, 512 P.2d 416 (1973); *State v. Faidley,* 202 Kan. 517, 520, 450 P.2d 20 (1969). These protections provide that no person shall be compelled in any criminal case to be a witness against himself.

It is now established that governments may compel testimony which would otherwise be privileged by providing a grant of immunity, but only where the grant of immunity is coextensive with the scope of the constitutional privilege against self-incrimination. See *In re Birdsong*, 216 Kan. at 299-300. The trial court held that the grant of immunity given appellant under K.S.A. 22-3415 in this case was sufficient. K.S.A. 22-3415 reads as follows:

> "The county or district attorney or the attorney general may at any time, on behalf of the state, grant in writing to any person immunity from prosecution or punishment on account of any transaction or matter contained in any statement or about which such person shall be compelled to testify and such statement or testimony shall not

be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance. After being granted immunity from prosecution or punishment, as herein provided, no person shall be excused from testifying on the ground that his testimony may incriminate him unless such testimony is a violation of federal law. He shall not be granted immunity from prosecution for perjury or false statement or any other crime committed in giving such evidence."

In *In re Birdsong,* this court holds that the immunity provided under K.S.A. 22-3415 is coextensive with the constitutional privilege and a witness granted immunity under the statute is not justified in refusing to answer questions on the basis of the constitutional privilege. Appellant does not really question this; appellant's contention is that the attorney general exceeded his power in granting immunity before the Governmental Ethics Commission. It is appellant's position that K.S.A. 22-3415 grants authority to the named officers to grant immunity only in criminal cases conducted by them. Appellant therefore contends that the grant of immunity in the present case is not coextensive with this constitutional privilege in that it was given without statutory authority.

A prosecutor has no inherent power to grant immunity to a witness; statutory authority is required for such a grant. See *United States v. Ford,* 99 U.S. 594, 25 L.Ed. 399 (1878); *Com. v. Strickler,* —— Pa. ——, 393 A.2d 313, 315 (1978); *In re Daley,* 549 F.2d 469, 480 (7th Cir.), *cert. denied* 434 U.S. 829 (1977); *United States v. Gorham,* 523 F.2d 1088, 1096 (D.C. Cir. 1975); Annot. 13 A.L.R. 2d 1439 (1950). A witness

cannot be convicted of contempt for refusing to testify on the grounds of self-incrimination where the immunity offered him is invalid as being beyond the statutory power of the prosecution. See 17 Am.Jur.2d,Contempt § 32, p. 37. The question in this case then is one of statutory construction; does K.S.A. 22-3415 confer power on the attorney general and district and county attorneys to grant immunity for testimony before an administrative agency? This is a question of first impression.

The immunity provision in K.S.A. 22-3415 was not adopted until 1972. The statute on its face appears to confer broad authority on the attorney general and district and county attorneys in determining when immunity shall be given. This is a very potent authority in that K.S.A. 22-3415 confers transactional as well as use immunity and therefore the grant of immunity will bar prosecution on any matter contained in a statement or testimony given under the grant. *In re Birdsong,* 216 Kan. 297, Syl. ¶ 5. Appellant offers several theories to support his position that the statute does not authorize the grant of immunity attempted in this case. First appellant notes that the statute is contained in the criminal code. From this appellant argues that the statute only applies in criminal investigations and not administrative proceedings. Appellant also notes that the legislature has adopted other immunity statutes such as K.S.A. 1978 Supp. 22-3008 relating to grand juries and K.S.A. 22-3102 relating to inquisitions. The appellant asserts this demonstrates a legislative intent that K.S.A. 22-3415 not be all encompassing.

We reject this argument. Grand juries and inquisitions involve specialized proceedings. It is therefore

not surprising that the legislature would include special immunity statutes relating to them and by so doing the legislature has expressed no intention that K.S.A. 22-3415 be given a limited reading. Appellant also calls this court's attention to certain statutes containing immunity provisions which are limited to specific administrative agencies and officers. Appellant argues that by enacting immunity statutes relating to certain administrative agencies the legislature manifested the intention that K.S.A. 22-3415 should not apply to any agencies. This contention must also fail. As appellant admits, these specialized administrative immunity statutes grant automatic immunity from prosecution for witnesses who appear and testify. Thus in no way do these special provisions indicate a limitation on the provisions of K.S.A. 22-3415 which relate to permissive grants of immunity.

The powers conferred by K.S.A. 22-3415 on the attorney general and the district and county attorneys of this state are very broad. This statute confers power to grant immunity for testimony before an administrative agency such as the Governmental Ethics Commission.

In his second point of error appellant contends that the questions he refused to answer were irrelevant and that it violated his First Amendment rights to require him to answer them. Both objections are without merit.

The appellant is the son-in-law of Margaret Stoll who is the respondent before the commission. They both reside at the same address. Stoll signed certain letters which were sent to voters urging them to vote against Nick Tomasic. An order was placed for a volume of envelopes in the name of J. R. Russell, who was Toma-

sic's opponent. The envelopes were picked up and paid for by Cahill. Cahill admitted that he had the letters made up. No campaign finance report was ever filed in relation to these letters. Under these facts it became a question of who violated the statute on reporting.

The general rule expressed in K.S.A. 60-226 (*b*) is that any matter not privileged is discoverable if it is relevant. It is not a ground for objection that the information sought will be inadmissible at trial if it appears reasonably calculated to discover admissible evidence. Relevant evidence is defined in K.S.A. 60-401 (*b*) as "evidence having any tendency in reason to prove any material fact." It is recognized that the scope of relevancy in deposition proceedings is even broader than the scope of relevancy at trial. See *Fields v. Stauffer Publications, Inc.*, 2 Kan. App. 2d 323, 326, 578 P.2d 1138, *rev. denied* 224 Kan. clxxxvii (1978). It seems apparent that the legislature by providing in K.S.A. 1978 Supp. 25-4124 that depositions could be taken in proceedings under the Campaign Finance Act "in the same manner as in civil actions" intended the same broad scope of discovery. The questions asked appellant in this case clearly were relevant.

Appellant also contends that his First Amendment right to association is violated by requiring him to answer the questions in this case. Appellant attempts to support this argument by citing United States Supreme Court cases which hold that compelled disclosure of associational information can seriously infringe on privacy of association and belief as guaranteed by the First Amendment. See *Buckley v. Valeo,* 424 U.S. 1, 64, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). Under this rule the states may be precluded from compelling disclosure of information concerning associational activi-

ties because such disclosure will have a "chilling effect" on First Amendment freedoms. See generally *Gibson v. Florida Legislative Comm.,* 372 U.S. 539, 9 L.Ed.2d 929, 83 S.Ct. 889 (1963); *N.A.A.C.P. v. Button,* 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963); *Bates v. Little Rock,* 361 U.S. 516, 4 L.Ed.2d 480, 80 S.Ct. 413 (1960).

Thus, a state may not require teachers, as a condition of their employment, to file annually an affidavit listing every organization to which they have belonged or regularly contributed during the prior five years. *Shelton v. Tucker,* 364 U.S. 479, 5 L.Ed.2d 231, 81 S.Ct. 247 (1960). In another case the court has held that a state may not punish the N.A.A.C.P. for contempt for refusing to disclose the names of all its members where it is shown such disclosure could result in reprisals against the members. Once again the court is concerned with the chilling effect such forced disclosure will have on associational freedoms. *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 2 L.Ed.2d 1488, 78 S.Ct. 1163 (1958).

It would appear to be appellant's position that the First Amendment, as construed in the cases outlined above, prohibits the state from compelling testimony from him which relates to his political activities. He asserts in this case that the commission cannot require him to disclose the amount of his expenditure in reproducing the letter which Margaret Stoll signed calling for Nick Tomasic's defeat. The Supreme Court, however, has never held that the First Amendment precludes the states from compelling relevant testimony from a witness merely because that testimony will relate in some degree to that witness' political activities. Appellant has made no showing whatsoever that disclosure of this information interferes with his First Amendment freedoms. The point is spurious. No First Amendment rights of appellant are violated by compelling him to answer the questions asked of him in this case.

In his third point of error appellant alleges the trial court lacked jurisdiction to cite him for contempt. The reason for this, as will be more fully developed, is that the deposition was taken more than fifty miles from his residence. The point lacks merit.

The first thing to be noted is that K.S.A. 1978 Supp. 25-4124 expressly grants the Shawnee County District Court jurisdiction to issue contempt citations arising out of commission proceedings. The appellant argues this statute does not cover contempts arising out of depositions but only contempts arising out of hearings before the commission. K.S.A. 1978 Supp. 25-4124 does control contempts arising out of depositions and therefore the trial court had jurisdiction in this case.

Appellant's next contention is as follows: First K.S.A. 1978 Supp. 25-4124 provides that "[d]epositions may be taken and used in the same manner as in civil actions." The administrative rule of the Governmental Ethics Commission relating to depositions in commission proceedings is Rule 19-7-6 (1978). The rule provides that the procedures outlined in K.S.A. 60-226 shall be used. However, K.S.A. 60-226 does not deal with procedures for conducting depositions. It contains general provisions governing discovery. Appellant contends, and correctly so, that the inclusion of K.S.A. 60-226 was a draftsmanship error and the rule really contemplates adopting the procedures under K.S.A. 60-230.

Assuming this to be correct K.S.A. 60-230 (*a*) provides that attendance of a witness may be compelled by subpoena as provided in K.S.A. 60-245. That statute, as appellant notes, deals with subpoenas covering not only depositions but also hearings and trials.

K.S.A. 60-245 (*d*) (2), relating to subpoenas for taking depositions, provides in part:

> "A resident of this state shall not be required to attend an examination at a place which is not within fifty (50) miles of either the place of his residence, or of the place of his employment, or of the place of his principal business. . . ."

It appears to be conceded by all parties that the deposition was taken at a place more than fifty miles from appellant's place of residence, employment, or principal business. However, K.S.A. 60-245 (*d*) (2) does not say that a deposition may not be taken outside such area. It merely provides that a resident "shall not be required to attend an examination" outside this area. In this case appellant and his counsel were present when Judge Barbara set the deposition for the Shawnee County Courthouse, and they made no objection. One reason for setting the deposition in the courthouse appears to have been so Judge Barbara would be available to settle disputes. Appellant did object to the location on the day of the deposition. There was also some talk about the fifty mile limitation prior to setting the deposition; however, this had to do with an unrelated contention by appellant. Appellant waived any objection to the fifty mile limitation on the place of taking a deposition when he appeared at the appointed time and place.

Judgment affirmed.

APPENDIX B

Judgment of the Supreme Court of Kansas

SUPREME COURT,)
) ss.
STATE OF KANSAS,)

Dist. Court No. 78-CV 0260 No. 50185

The State of Kansas, to the District Court within and for the County of Shawnee in the State of Kansas, Greeting:

WHEREAS, In a certain civil, action lately pending before you, wherein State Governmental Ethics Commission was plaintiff and Robert J. Cahill, et al were defendants, a judgment was rendered by you against the said Defendant from which judgment said Defendant prosecuted an appeal in the Supreme Court within and for the State of Kansas;

AND WHEREAS, at the March Session of the January Term of said Supreme Court, A.D. 1979, on consideration of the said appeal _____ it was ordered and adjudged by the said Supreme Court that the judgment of the District Court be Affirmed, a certified copy attached hereto, and that the said _____ recover against the said _____ Dollars for _____ costs herein expended and have execution therefor.

YOU ARE THEREFORE COMMANDED, That without delay you cause execution to be had of the said judgment of the Supreme Court, according to law.

Costs	
Fees of Clerk Supreme Court	$35.00 Paid
Record	_____
Transcript	_____
Other costs	_____
Total	$_____

WITNESS my hand and the seal of said Supreme Court affixed hereto, at my office, in the City of Topeka, on June 28, 1979 A.D.

/s/ LEWIS C. CARTER
Lewis C. Carter, *Clerk of the Supreme Court.*

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 50,185

GOVERNMENTAL ETHICS COMMISSION, *Appellee,*

v.

ROBERT J. CAHILL, *Appellant,*

and

MARGARET G. STOLL, *Intervenor.*

Order Denying a Rehearing

The appellant Robert J. Cahill having filed a Motion for Rehearing in the above captioned appeal and this court having fully considered the same it is found that in the third paragraph of page (1) and in the first full paragraph of page (3) the typewritten opinion erroneously referred to "22,500 letters." These references should be corrected in the bound volume of the Kansas Reports to read "22,500 envelopes." To this extent the appellant's suggestions in support of his Motion for Rehearing are adopted. The Motion for Rehearing in all other particulars is denied.

Copies of this order shall be mailed to all parties and to the Supreme Court Reporter.

Dated June 14, 1979.

THE SUPREME COURT OF KANSAS

By /s/ ALEX M. FROMME
Alex M. Fromme, Justice

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 50,185

ROBERT J. CAHILL, *Appellant,*

v.

GOVERNMENTAL ETHICS COMMISSION, *Appellee.*

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that ROBERT J. CAHILL, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Court of Kansas, entered herein May 5, 1979, affirming the judgment of contempt of the District Court of Shawnee County, Kansas. The Supreme Court of Kansas denied a rehearing of this judgment in an order entered herein on June 14, 1979. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

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Of Counsel

[The above Notice of Appeal was filed on September 7, 1979, and all parties required to be served have been served. The Certificate of Service has been omitted from this Appendix.]

Supreme Court, U.S.
FILED
NOV 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-409

ROBERT J. CAHILL,
Appellant

v.

GOVERNMENTAL ETHICS COMMISSION
Appellee

On Appeal from the Supreme Court
of the State of Kansas

MOTION TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT

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MOTION TO DISMISS OR AFFIRM

Appellee, Governmental Ethics Commission, hereby moves the Court to dismiss so much of the appeal herein as relates to the constitutionality of K.S.A. 25-4118 and 25-4124 since issues raised thereby were not timely or properly raised nor expressly passed on by the Supreme Court of the State of Kansas.

Appellee further moves that the entire appeal be affirmed on the grounds that the questions presented are wanting in any substance due to previous decisions of this Court.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM

I. Whether K.S.A. 25-4118 and 25-4124 are unconstitutional as applied by the State of Kansas and as construed by the Supreme Court of Kansas.

In the appeal of this matter to the Kansas Supreme Court, the issues presented were framed by the Appellant as follows:

(1) Is the written grant of immunity tendered the witness Cahill coextensive with the scope of the constitutional privilege against self-incrimination?

(2) Can Cahill be required to answer the questions put to him by counsel for the Commission in violation of his First Amendment rights?

(3) Did the trial court have jurisdiction to punish Cahill for contempt?

As may be seen from a review of appellant's stated issues on appeal to the Kansas Supreme Court, any contention concerning the constitutionality of K.S.A. 25-4118 and 25-4124 is lacking. A review of appellant's brief therein discloses no arguments on the constitutionality of these statutes nor does the Court's opinion indicate that it ever expressly passed thereon.

The above issue should be dismissed pursuant to U.S. Sup. Ct. Rule 16(1) (6), 28 U.S.C., as the issue was not properly raised nor expressly passed upon. *Neely v. Martin K. Ebby Construction Co.*, 386, U.S. 317, 87 S. Ct. 1072, 18 L.Ed. 2d 75 (1967).

II. Whether appellant was denied his rights of association under the First and Fourteenth Amendments in an inquiry by the State into his political associations and beliefs.

Regardless of the resolution of appellee's motion to dismiss, this case should be affirmed as it presents questions wanting in substance due to prior decision of this Court.

As to factual background, the appellant notes in his jurisdictional statement that he was subpoenaed to give testimony before the Governmental Ethics Commission regarding a complaint filed before the Commission which alleged that his mother-in-law had failed to file a report of independent campaign expenditures as required by K.S.A. 25-4110 in the 1976 race for the office of District Attorney of Wyandotte County, Kansas.

K.S.A. 25-4113 states as follows:

> Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of one hundred dollars ($100) or more within a calendar year shall make statements containing the information required by K.S.A. 1975 Supp. 25-4108, and file them in the office of the secretary of state so that each such statement is in such office on the day specified in K.S.A. 1975 Supp. 25-4108. Reports made under this section need not be cumulative.

That section has been interpreted and implemented by the Commission in K.A.R. 19-21-5 as follows:

> Every person, other than a candidate or a candidate committee, party committee or political committee, who makes independent contributions or expenditures other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of one hundred dollars ($100) or more within a calendar year shall make verified statements containing the information required by K.A.R. 19-29-2 on forms prescribed and provided by the commission, and file them in the office of the secretary of state so that each such statement is in such office on the day specified in K.A.R. 19-28-1. Reports made under this section need not be cumulative. For the purposes of this section "independent contributions and expenditures" means contributions or expenditures made without cooperation or consent of the candidate or committee intended to be benefited thereby and which expressly advocate the election or defeat of a clearly identified candidate.

Returning to the factual situation, appellant recognizes that the subpoena to him was issued after a probable cause determination by the Commission and he was compelled to testify by the District Judge of Shawnee County, Kansas, only after being granted immunity which was found by the Kansas Supreme Court to be co-extensive with the appellant's Fifth Amendment rights.

The appellant's mother-in-law lived with the appellant and signed and distributed certain campaign materials which expressly advocated the defeat of a clearly identified candidate. Appellant produced the materials and pick-up envelopes from a vendor which had been ordered by the candidate benefited by the mailings and which were apparently used for the mailings.

At issue then is whether forced disclosure pursuant to a grant of immunity concerning independent campaign expenditures violates the First and Fourteenth Amendments. This Court has already ruled on the issue.

N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, recognized that in certain situations public disclosure of associational ties could prevent free exercise of First Amendment rights. This result would be obtained where public disclosure could adversely effect an important demonstrated interest.

However, it is clear that neither the right to associate nor the right to participate in political activities is absolute (*Civil Service Commission v. Letter Carriers*, 413 U.S. 548). Indeed, even a significant interference with protected association may be sustained if the state demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms (*Cousins v. Wigoda*, 419 U.S. 477, 95 S. Ct. 541, *Shelton v. Trucker*, 364 U.S. 479, 81 S. Ct. 247).

The application of the above tests to reporting of independent contributions and expenditures has already been resolved at the federal level in *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612. There, this Court recognized several

important interests involved generally in the requiring of the reporting of campaign contributions and expenditures (see *Buckley v. Valeo*, 424 U.S. at 67, 68). More importantly, this Court went on to find 18 U.S.C. §434(e) (the companion at the federal level to K.S.A. 24-4110) was further supported by such important governmental interests as being responsive to the legitimate fear that efforts would be made, as they had in the past, to avoid disclosure by routing financial support of candidates through avenues not covered by other provisions, and providing for full disclosure as a maximum deterrence for corruption and undue influence (*Buckley v. Valeo*, 424 U.S. at 76). On these grounds, this Court held that 18 U.S.C. §434 when construed narrowly was constitutionally sound.

Since K.S.A. 25-4110 as interpreted by K.A.R. 19-21-5 are parallel in all pertinent aspects to 18 U.S.C. §434 as interpreted in *Buckley v. Valeo*, 424 U.S. at 80, 81, 82, there remains no substantial issue regarding the application of the First Amendment to the disclosures required in this case. The case should be affirmed. *Missouri Pacific R. Co. v. Castle*, 224 U.S. 541, 32 S. Ct. 606, 56 L.Ed. 875 (1912).

Should there be any lingering questions, it should be noted that appellant failed at the trial level and on appeal to raise any demonstrated facts which would indicate an adverse effect by disclosure. *Governmental Ethics Commission v. Cahill*, 225 Kan. 772, 779, ____ P. 2d ____ (1979). Having failed to raise such issues, appellant is foreclosed from attempting to do so here. *Neely v. Martin K. Ebby Construction Co.*, 386, U.S. 317, 87 S. Ct. 1072, 18 L.Ed. 2d 75 (1967). Without such a demonstration, appellant cannot prevail. *Buckley v. Valeo*, 424 U.S. at 69.

CONCLUSION

For the reason set forth above, the appeal should be dismissed as to the first allegation or in the alternative the judgment of the Supreme Court of Kansas should be affirmed in all respects.

Respectfully submitted,

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